

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

IN RE MUSHROOM TRANSPORTATION	:	BANKRUPTCY
COMPANY, INC.,	:	
	:	No. 85-02575F
Debtor.	:	Adv. Pro. 94-404F

JEOFFREY L. BURTCH, TRUSTEE, et al.,	:	CIVIL ACTION
	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
MIDLANTIC BANK, N.A.,	:	
	:	
Defendant.	:	NO. 97-7006

MEMORANDUM

Reed, J.

September 30, 1998

This is an appeal by plaintiffs Jeffrey L. Burtch, Trustee in bankruptcy of Mushroom Transportation Company, Inc., Robbey Realty, Inc., Penn York Realty Company, Inc., Trux Enterprises, Inc., Michael Arnold, and The Home Insurance Company (hereinafter collectively referred to as "Burtch") from the order of the bankruptcy court of October 25, 1995 granting summary judgment to defendant Midlantic Bank, N.A. ("Midlantic"). This Court has appellate jurisdiction pursuant to 28 U.S.C. § 158(a). For the reasons that follow, the order of the bankruptcy court will be affirmed.

I. Factual and Procedural Background

Jonathan Ganz, former counsel for Mushroom Transportation Company, Inc., was

convicted of wrongfully using proceeds from the bankruptcy estates of, among others, Mushroom Transportation, Penn York Realty, Robbey Realty and Trux Enterprises (the debtors' estate) for his own purposes. The trustee of the debtors' estate, Burtch, filed a complaint against Midlantic, as well as other alleged recipients of these stolen funds, alleging claims for conversion and for a declaration that Midlantic holds this property in constructive trust on behalf of the debtors' estate.

More specifically, Burtch claimed that Ganz paid Midlantic \$135,000 with funds from the debtors' estate as payment on a loan made by Midlantic to Rental Systems Incorporated ("RSI"), a corporation owed by Ganz. Burtch also claimed that other amounts were paid to Midlantic on the RSI loan which could be traced through RSI to Midlantic because when RSI subsequently defaulted on the loan, Midlantic liquidated and collected all of RSI's assets.

In its motion for summary judgment, Midlantic argued that the check for \$135,000 was made payable to RSI and never paid to Midlantic, but rather was immediately transferred to another bank in an working capital account for RSI as part of the loan closing. As for the other alleged payments to Midlantic, Midlantic argues that lacked evidence sufficient to survive summary judgment and that these alleged transactions were outside the scope of the pleadings. Alternatively, Midlantic argued that it was entitled to summary judgment as a good faith bona fide purchaser for value.

In the order granting summary judgment to Midlantic, the bankruptcy court concluded that Burtch would have to show for the constructive trust claim that Midlantic received funds stolen by Ganz from the debtors' estates and for the claim of conversion that Midlantic exerted

dominion or control over funds stolen by Ganz.¹ (Bankruptcy Opinion at 13). The bankruptcy court further concluded that Burtch presented no evidence to support his contention that Midlantic actually received or controlled the \$135,000 in stolen money, and thus there were no genuine issues of material fact on Burtch's claims of conversion and constructive trust. The bankruptcy court did not address the argument of Midlantic that it received the money in good faith and paid value for the stolen money.

As for the arguments by Burtch that other amounts of stolen funds could be traced to Midlantic Bank, the bankruptcy court expressed doubt that such claims were within the scope of the pleadings, but concluded that Burtch could nonetheless not survive summary judgment on these claims because he did not present evidence sufficient to survive summary judgment.

II. Standard of Review for Bankruptcy Judge's Grant of Summary Judgment

This Court's review of the bankruptcy court's order granting summary judgment to Midlantic is plenary. See Rosen v. Bezner, 996 F.2d 1527, 1530 (3d Cir. 1993) (noting that appellate review of bankruptcy court's grant of summary judgment is plenary as summary judgment is only proper in cases in which the court concludes as a matter of law that no genuine issues of material fact remain). The bankruptcy court is held to the standard set forth in Federal Rule of Civil Procedure 56 in deciding a motion for summary judgment. See Federal Rule of

¹ Burtch argued to the bankruptcy court that either federal common law or New Jersey law should apply to the motion for summary judgment, while Midlantic argued that Pennsylvania law should apply. The bankruptcy court held that it "need not decide, in the context of resolving the instant motion for summary judgment, whether New Jersey law, Pennsylvania law, or federal common law should be applied" as the relevant elements of the tort of conversion and for declaration of a constructive trust were substantively the same without regard to the source of the law. (Bankruptcy Opinion at 15). I agree. Burtch does not argue on appeal that the bankruptcy court's assessment of the choice of law issue as to whether Midlantic received the stolen funds or its interpretation of the law of conversion or constructive trust was incorrect.

Bankruptcy Procedure 7056.

Rule 56(c) of the Federal Rules of Civil Procedure provides that "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law" then a motion for summary judgment shall be granted.

The moving party has the initial burden of illustrating for the court the absence of a genuine issue of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Adickes v. S.H. Kress & Co., 398 U.S. 144, 159-161 (1970). The movant can satisfy this burden by "pointing out to the district court that there is an absence of evidence to support the nonmoving party's case;" the movant is not required to produce affidavits or other evidence to establish that there are no genuine issues of material fact. Celotex, 477 U.S. at 323-25.

Once the moving party has made a proper motion for summary judgment, the burden switches to the nonmoving party. Under Rule 56(e),

[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

The court is to take all of the evidence of the nonmoving party as true and to draw all reasonable inferences in his favor in determining if there is a genuine issue of material fact. See Adickes, 398 U.S. at 158-59. In order to establish that an issue is genuine, the nonmoving party must proffer evidence such that a reasonable jury could return a verdict in her favor. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49 (1986). A proper motion for summary judgment will

not be defeated by merely colorable or insignificantly probative evidence. See id. at 249-50.

III. Analysis of Arguments Presented on Appeal

A. Burtch's Argument That Genuine Issues of Material Fact Remain as to Whether Midlantic Received the \$135,000 in Stolen Funds

In concluding that there were no genuine issues of material fact as to whether Midlantic received or exercised control over the \$135,000, the bankruptcy court relied on the deposition testimonies of Ganz and Michael Geissler, an employee of Midlantic who dealt with the loan to RSI, as well as Geissler's affidavit. While noting that Ganz's testimony regarding the disposition of the funds of the \$135,000 is "initially vague," the bankruptcy court concluded that later testimony of Ganz and Geissler made clear that the testimony of Ganz and Geissler was that Midlantic did not receive the \$135,000, but rather, because Midlantic required RSI to maintain a working capital account as a condition of the loan, the check was deposited by Midlantic into RSI's bank account in a Bucks County Bank for this purpose. (Ganz dep. at 113-114; Geissler Aff. at ¶¶ 4-7). The bankruptcy court found that Burtch presented no evidence to establish that Midlantic had received this money other than pointing to Ganz's initial inability to recall the disposition of the check and pointing to a perceived inconsistency between Geissler's affidavit and his deposition testimony. (Bankruptcy Opinion at 30). Thus, the bankruptcy court concluded that Burtch had not presented evidence sufficient to show that Ganz paid that money to Midlantic or repaid a debt owed to Midlantic to survive summary judgment.

I conclude that the bankruptcy court's conclusion that there were no genuine issues of material fact on the question of whether Midlantic received the \$135,000 was supported by the

record and was not in error. The only evidence presented to the bankruptcy court showed that the check was not paid to Midlantic or used to repay a debt owed to Midlantic, but rather was set up as a capital account for RSI at another bank. The short portion of Ganz's testimony in which he could not initially recall exactly what happened to the check is not sufficient to survive summary judgment, in light of his later testimony. Burtch presented no evidence to show that Midlantic actually received or controlled these stolen funds.

B. Burtch's Argument that the \$135,000 or Other Stolen Funds May be Traced Back to Midlantic

Burtch argues on appeal that even if this Court affirms the bankruptcy court's conclusion that he presented insufficient evidence that Midlantic actually received the check for \$135,000, the bankruptcy court's grant of summary judgment to Midlantic should be reversed because he has evidence that Midlantic received stolen funds in two other ways. First, Burtch argues that under his theory of constructive trust, the \$135,000 in stolen funds may be traced through RSI to Midlantic due to the liquidation and acquisition of all the assets of RSI by Midlantic. (Appellants' Brief at 14 and 20). Second, Burtch claims that Midlantic received payments of stolen funds toward the RSI loan other than the \$135,000, in checks totaling approximately \$389,000. In appellants' brief, Burtch lists several checks that he claims were paid to Midlantic on the RSI loan, including checks for \$35,000 and \$25,000 and two checks for \$5,000. (Appellants' Brief at 9-10). In addition, Burtch references other checks which were endorsed by Ganz or deposited for the benefit of RSI at the escrow account at the law firm of Astor, Weiss, Newman. Finally, Burtch points to \$30,000 in closing costs that were paid to Midlantic on the date of the loan

closing. Again, Burtch argues that the amounts of these checks can be traced to Midlantic either directly or because Midlantic liquidated and collected all of RSI's assets when it defaulted on the loan. (Appellants' Brief at 10-11).

In defending the motion for summary judgment, Burtch presented the bankruptcy court with nearly illegible photocopies of these checks which involved RSI and some of which were endorsed by Midlantic Bank as evidence that Midlantic had received stolen funds from Ganz. In addition, Burtch argued that Ganz contributed \$1.2 million in equipment to RSI from another corporation he owned, and that the assets of RSI were eventually liquidated by Midlantic when RSI defaulted on the loan with Midlantic. Burtch asserted that it could be inferred that the money for such expensive equipment came from stolen funds.

Midlantic argued that Burtch submitted no evidence of such alleged payments to Midlantic from stolen funds of the debtors' estates. Indeed, Ganz testified that the \$30,000 in closing fees were not paid with stolen funds. (Ganz dep. at 113-14). Geissler testified that all closing fees received by Midlantic Bank were paid by RSI. (Geissler dep. at 53-54). Ganz admitted to making one payment of \$10,000 to Midlantic Bank, but he could not recall whether the source of the payment was stolen funds or who was the ultimate recipient of the funds. (Ganz dep. at 84). Ganz testified that he made no repayments on the RSI loan or any other payments to Midlantic Bank from an escrow account held by Astor, Weiss, Newman. (Ganz dep. at 86-87, 97-98).

The bankruptcy court found that Burtch presented insufficient evidence that Midlantic received any of these other funds or that these alleged payments to Midlantic were from stolen funds from Mushroom Transportation or any of the other plaintiff corporations. The bankruptcy

court reasoned that payments from Ganz on the RSI loan to Midlantic Bank could have come from stolen funds from other debtors' estates or from Ganz's personal income. Without evidence tracing these payments from the debtors' estates to Midlantic, the bankruptcy court reasoned that Midlantic cannot be held liable to Burtch. (Bankruptcy Opinion at 32-35) This conclusion was not in error.² Even taking all reasonable inferences from this evidence in favor of Burtch, a reasonable jury could not return a verdict in favor of Burtch on the evidence of record. Thus, the conclusion of the bankruptcy court will not be disturbed. See City of Farrell v. Sharon Steel Corp., 41 F.3d 92, 95 (3d Cir. 1994) (noting that in order for city to collect taxes withheld by debtor employee from its employees under theory that the debtor employer held these tax funds in trust, the city must be able to identify and trace the trust funds if commingled); P.T. Tirtamas Majutama v. Drexel Burnham Lambert Group, Inc., 142 B.R. 633, 637 (S.D.N.Y. 1992) ("It is hornbook law that before a constructive trust may be imposed, a claimant to a wrongdoer's property must trace his own property into a product in the hands of the wrongdoer.")(quoting United States v. Benitez, 779 F.2d 135, 140 (2d Cir. 1985)).

C. Burtch's Argument That Midlantic Destroyed or Lost Key Documents Entitling Him to an Inference Adverse to Midlantic

Burtch claims that he did not receive in discovery certain records of loan payments made

² The bankruptcy court also questioned whether the pleadings of the second amended complaint of Burtch would allow Burtch to pursue his argument that Midlantic received stolen funds other than the \$135,000. (Bankruptcy Opinion at 33). Burtch argues on appeal that his complaint should not be construed to limit his claims to the \$135,000, as he is able to prove any amount of damages as long as he alleged that Midlantic received stolen funds from the debtors' estates. Because I conclude that the bankruptcy court did not err in finding that Burtch had insufficient evidence that Midlantic received any funds stolen from the plaintiff corporations, this Court may assume without deciding, as the bankruptcy court did, that Burtch's complaint would support such a claim.

to Midlantic Bank and that he is entitled to an inference that the missing documents would contain evidence that Midlantic received stolen funds. The bankruptcy court considered Burtch's version of this argument below, which was that Burtch needed more discovery to locate some of the records of payments made on the Midlantic loan to RSI, a request which the bankruptcy court denied as untimely. Midlantic admitted that certain documents were lost during Midlantic's merger with another bank before the institution of this case.

Burtch does not show how records of loan payments to Midlantic would contain evidence that the payments were made with stolen funds, that the funds were stolen from Mushroom or the other plaintiff corporations, or that the missing documents contain information otherwise adverse to Midlantic. In addition, Burtch presented no evidence that Midlantic destroyed the documents nor evidence to refute Midlantic's explanation that the documents were lost in connection with the merger. See Brewer v. Quaker State Oil Refining Corp., 72 F.3d 326, 334 (3d Cir. 1995) (noting the "well established" rule that in order for an adverse inference to be drawn, the evidence in question must be actually withheld or suppressed, but that no adverse inference is drawn when the circumstances indicate that the documents in question has been lost of accidentally destroyed); In re Hunerson, 96 B.R. 541 (Bankr. E.D. Pa. 1989) (noting that no adverse inference should be drawn unless explanations of nonproduction are refuted).

The bankruptcy court concluded that Burtch was not entitled to an inference adverse to Midlantic so to avoid summary judgment. This conclusion was not in error.

D. Midlantic's Good Faith Defense

Midlantic argued to the bankruptcy court and now argues on appeal that even if the

bankruptcy court found that Burtch had presented evidence sufficient to show that Midlantic had received the stolen funds, it was entitled to summary judgment on the ground that it received the money in good faith and as a bona fide purchaser for value. Burtch contends that genuine issues of material fact remain on this issue precluding summary judgment. The bankruptcy court found it was unnecessary to reach this argument because it found that Midlantic was entitled to summary judgment because Burtch failed to sustain his burden on the issue of whether Midlantic actually received the stolen funds. Because this Court will affirm the decision of the bankruptcy court, there is no reason to address Midlantic's second argument here.

IV. Conclusion

Based on the foregoing, the order of the bankruptcy court dated October 25, 1995 will be affirmed. An appropriate Order follows.

**IN THE UNITED STATES DISTRICT COURT
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JEFFREY L. BURTCH, TRUSTEE, et al.,	:	CIVIL ACTION
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v.	:	
	:	
MIDLANTIC BANK, N.A.,	:	
	:	
Defendant.	:	NO. 97-7006

O R D E R

AND NOW, this 30th day of September, 1998, upon consideration of the appeal of plaintiffs-appellants Jeffrey L. Burtch, Trustee, Robbey Realty, Inc., Penn York Realty Company, Inc., Trux Enterprises, Inc., Michael Arnold, and The Home Insurance Company (Document No. 1), the brief of plaintiffs-appellants (Document No. 8), the brief of the defendant-appellee Midlantic Bank, N.A. (Document No. 10), the reply of the plaintiffs-appellants (Document No. 11), the reply of the defendant-appellee (Document No. 12), and the joint appendix (Document No. 9), as well as the entire record, and for the reasons stated in the memorandum opinion of this Court, it is hereby **ORDERED** that the order of the bankruptcy court dated October 25, 1995 is **AFFIRMED**.

LOWELL A. REED, JR., J.